Service Date: September 19, 1996

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF the Request of Ronan Telephone Company to Offer Switched 56 Kilobit Service on a Detariffed Basis	))))	UTILITY DIVISION DOCKET NO. N95.8.119 ORDER NO. 5941

ORDER ON MOTION FOR RECONSIDERATION

Introduction and Procedural Background

Ronan Telephone Company (RTC) filed a Motion for Reconsideration and supporting Brief on December 8, 1995 requesting reconsideration of a Montana Public Service Commission (Commission) decision. The Commission modified RTC's proposed offering of Switched 56 Kilobit (Kb) and approved it as a fully tariffed service, and supported its conclusion by citing the absence of effective competition and § 69-3-807(6), MCA. *See* Notice of Commission Action, Docket No. N95.8.119 (November 21, 1995). Switched 56 Kb service is a regulated high speed data transmission service that RTC has been providing to St. Luke's Community Hospital in Ronan on a test basis. RTC has provided Switched 56 Kb service in its service territory during the pendency of the Commission's decision on RTC's Motion for Reconsideration. PTI Communications provides a similar service to one customer located in RTC's traditional service territory, the Salish-Kootenai College.

Regulated telecommunications services may be tariffed or detariffed, depending on the form of regulation that will best serve the policies declared in the MTA. RTC originally applied for approval of Switched 56 Kb service as a detariffed "new service" pursuant to § 69-3-810, MCA. In the Motion for Reconsideration, RTC asked the Commission to amend its prior ruling and approve Switched 56 Kb service on a detariffed basis as originally requested. In a work session held on January 3, 1996, the Commission voted 3-2 to deny the Motion for Reconsideration and affirm the initial decision. On February 20, 1996, the Commission reversed

the January 3, 1996 decision and voted 4-1 to grant the Motion for Reconsideration and directed staff to draft an order approving the service as detariffed. The draft order was considered in two subsequent work sessions held on July 15, 1996 and on September 10, 1996. On the latter date, the Commission voted 4-1 to affirm the original order approving Switched 56 Kb service on a tariffed basis and directed staff to prepare the order reflecting this decision.

Commission Decision

RTC's Motion for Reconsideration raised the following issues: (1) whether the Commission may approve an application for a detariffed new service as a tariffed service; (2) whether the Commission rules for detariffing would be declared invalid and unenforceable by a court; and (3) whether the Commission properly applied the "equal regulation" statute, § 69-3-807(6), MCA.

1. Detariffing Services

The advantage to a telecommunications provider of providing a service on a detariffed basis relates to pricing flexibility. As long as the price does not go below an approved minimum, carrier-initiated price changes for detariffed services are automatically effective without notice to consumers and without Commission action seven days following notification to the Commission. In contrast--with one exception that applies to RTC and other small companies--prices for tariffed services may not be changed without Commission approval. The exception for small telecommunications providers allows providers with less than 5,000 access lines to change prices 60 days after they give notice to their subscribers. No Commission approval is necessary or permitted unless the Montana Consumer Counsel or 10 percent of the subscribers object. *See* 69-3-901, MCA, *et seq*.

Although either treatment allows price changes without Commission approval, detariffing allows a carrier to respond quickly to market forces where there is competition for such services. Reduced regulation by means of detariffing, properly applied, conforms to the purposes of the MTA. Stated purposes include the furthering of the state policy objectives to encourage competition in the telecommunications industry and to allow public access to rapid advances in telecommunications technology by providing "a regulatory framework that will allow an orderly

transition from a regulated telecommunications industry to a competitive market environment." Section 69-3-802, MCA.

RTC filed to offer Switched 56 Kb as a "new service" pursuant to § 69-3-810, MCA, requesting further that it be detariffed. The Montana Legislature did not include a detailed format for consideration of applications pursuant to the "new service" statute as it had previously done in § 69-3-807, MCA, but relied instead on its grant of rulemaking authority in § 69-3-822, MCA, permitting the Commission to adopt rules to implement the MTA. The Commission adopted the rules set forth at ARM 38.5.2730 - 38.5.2750 for use in considering applications for detariffing new services so that it could achieve this orderly transition to a fully competitive environment in a manner that best serves the public interest. Alternatively, a telecommunications provider may choose to have its application considered according to the guidelines listed in § 69-3-807(2) and (3), MCA, and the Commission's detariffing rules for existing services, ARM 38.5.2711 through 38.5.2712, or according to the standards set forth in § 69-3-807(4), MCA. *See* ARM 38.5.2730.

When the application to offer a new service as detariffed has been considered pursuant to Commission rules, the Commission may deny the application if the factors indicate that the new service should not be detariffed. RTC argues that the Commission's discretion is limited to approval, denial, suspension or interim approval of the filing as submitted and that the Commission has no authority to approve it on a tariffed basis. According to the argument RTC makes, if the Commission wanted to approve such an application on a tariffed basis, the Commission would have to reject RTC's filing for approval on a detariffed basis and require RTC to refile its application to provide the service on a tariffed basis in order to provide the service. This circuitous route to approval of a new service makes little sense when the service is presently being provided and RTC has indicated an intent to offer it to other customers. It would merely delay the offering of the service to new customers.

Further support for approval of the application on a tariffed basis is contained in ARM 38.5.2740(4), which provides that, "Regardless of the form of approval, disapproval or suspension, the commission may conduct further investigations, hold hearings or public

meetings, and take other appropriate actions at any time." (Emphasis added.) This does not appear to indicate that the Commission's discretion should be limited to the factors expressly stated in ARM 38.5.2740(2)(a)-(d) (i.e., approve, deny, suspend, or grant interim approval). This conclusion is consistent with the broad discretion given to the Commission by the legislature in § 69-3-807, MCA, for detariffing under other circumstances.

Consideration of existing service applications is addressed by § 69-3-807, MCA. Subsection (4) of § 69-3-807, MCA, amended in 1991, allows the Commission to exercise its discretion with respect to any services of a telecommunications provider, if the Commission finds that action consistent with the purpose of the MTA and with the public interest. This subsection allows the Commission to disregard the mandatory factors for detariffing services if the action taken is consistent with the MTA and in the public interest. The only statutory limitation on that discretion is that noncompetitive local exchange access to end-users and carrier access services may not be detariffed.

We believe that total rejection of the application for a new service is not appropriate nor is it in keeping with the MTA's purpose. Rather, it is consistent with that purpose as set forth in § 69-3-802, MCA, and with § 69-3-807, MCA, to consider the application in another light and, if appropriate, to approve the service as tariffed.

After the Commission's initial decision in this Docket, Congress set the stage for sweeping reform in the telecommunications industry by enacting the Telecommunications Act of 1996. The 1996 federal Act is intended to facilitate competition in the local marketplace and to allow providers of telecommunications services into each other's markets. However, the transition to a fully competitive market is in its infancy in Montana. The Commission believes that allowing RTC to provide Switched 56 Kb service as tariffed is in keeping with the spirit of the Federal Act. The only significant difference between a detariffed service and a tariffed service for a small telecommunications provider is the length of time the provider must wait before implementing price changes--seven days for detariffed services versus 60 days for tariffed services.

The Commission has reassessed RTC's application pursuant to the Motion for Reconsideration, and affirms its original order approving Switched 56 Kb service as fully tariffed.

2. Validity of the Commission's Rules for New Service Applications

Competitive factors were part of the basis of our previous ruling and our decision to affirm it. As directed in ARM 38.5.2730, § 69-3-810, MCA, applications are reviewed according to the rules at ARM 38.5.2730 - 38.5.2750, which expressly include competitive impacts and the purpose of the MTA (to promote competition) at ARM 38.5.2740. RTC has argued on Motion for Reconsideration that the Commission may not consider competitive factors in making decisions on detariffing because the rules directing such consideration would be held invalid by a court. As explained below, the Commission rules are valid and enforceable.

RTC's application stated that it was applying for approval of Switched 56 Kb service pursuant to § 69-3-810, MCA, "because this service is currently being provided to RTC subscribers by PTI Communications in RTC's traditional service area." RTC supported its request for detariffed treatment of Switched 56 Kb service with competitive references stating that the service is clearly a competitive service and that "RTC's pricing of this service is based on the tariffed price of our competitor's equivalent service rather than determined based on a regulated cost approach for a monopoly service."

This statement demonstrates that RTC considered competitive reasons when filing its application and elected to apply for approval under § 69-3-810, MCA. Thus, RTC's Brief in support of its Motion for Reconsideration is puzzling in its argument that the Commission cannot consider competitive factors and that the PSC rules regarding review of applications for new services pursuant to § 69-3-810, MCA, would be found invalid and unenforceable by a court. The rules emphasize competitive factors and the purposes of the MTA, which clearly support competitive criteria.

When a regulated company cites competitive reasons for support of its proposal to offer a service as detariffed, it is reasonable to at least consider competitive factors in reviewing the

application. ARM 38.5.2740(5) lists additional criteria the Commission may consider in deciding whether to approve a service as detariffed:

(a) whether the service falls within the definition of "new service," 69-3-808 [sic], MCA and ARM 38.5.2732;
(b) whether approval is consistent with the purposes of the Montana Telecommunications Act, §69-3-802, MCA;
(c) whether approval would encourage competition, have no effect on competition, or be anti-competitive;
(d) whether approval would violate any other provisions of Title 69, MCA; and
(e) any other information or factor relevant to the public interest.

According to RTC, ARM 38.5.2704(5) and other Commission rules for detariffing new services would be declared invalid by a court because they contain criteria that is in addition to or inconsistent with criteria included in the statute.

RTC cited three Montana cases to support its conclusion that an agency rule may not contain criteria in addition to or inconsistent with that included in the statute. *See McPhail v. Montana Bd. of Psychologists*, 196 Mont. 514, 517, 640 P.2d 906 (1982), *Board of Barbers v. Big Sky College of Barberstyling*, 192 Mont. 159, 161, 626 P.2d 1269 (1981), and *Bell v. Department of Licensing*, 182 Mont. 21, 594 P.2d 331 (1979). RTC has misinterpreted these cases.

While it is true that a rule that is inconsistent with a statute is likely to be found invalid and unenforceable, the same is not true for "additional" criteria. The substance of the additional criteria must be examined. Rules promulgated by an administrative agency must satisfy the test of reasonable necessity to effectuate the purpose of the statute. The cases cited by RTC stand for the principle that an administrative rule may not add requirements which were not envisioned by the legislature. They hold that agency rules "are 'out of harmony' with legislative guidelines ... if they engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature." *Bell*, 594 P.2d at 333.

A PSC rule relating to detariffing new services, to be declared invalid, would have to be a rule that engrafted additional requirements not envisioned by the legislature and which are not reasonably necessary to carry out the purposes of the MTA. The Commission rules relating to

detariffing new services were envisioned by the legislature and are reasonably necessary to carry out the purposes of the MTA. Had the legislature wanted to restrict the Commission's discretion in rulemaking, it could have included its own criteria for approval of detariffed services in § 69-3-810, MCA, as it did in § 69-3-807(3), MCA, describing detariffing under that section.

Representative Dorothy Bradley, in a hearing on House Bill 577 during the 1985 legislative session prior to its enactment explained that the intent of the bill was to allow the PSC to adopt rules for detariffing new services because the PSC was better-equipped to handle the specific details for detariffing new services.[1] Furthermore, the criteria listed in § 69-3-807(3), MCA, for detariffing existing services may be disregarded totally by the Commission in most instances if the action taken is consistent with the purpose of the MTA and is in the public interest. Section 69-3-807(4), MCA. This indicates that the legislature did not want to restrict the Commission's discretion in this area. There is absolutely no reason to treat "new service" applications with less discretion than existing service applications for detariffing.

Moreover, because a fully competitive market environment was envisioned by the legislature when it stated the purpose of the MTA was to provide a regulatory framework for its transition to full competition, failure to consider competitive criteria would be contrary to the purpose of the MTA. Again, it would also have been unresponsive to RTC's expressly stated rationale for offering the service as detariffed. Thus, in making detariffing decisions, Commission consideration of competitive effect is essential to carry out the purposes of the MTA.

The MTA and Montana case law do not support the argument made by RTC that the Commission's rules are beyond the authority of the Commission and that they would be found invalid by a court.

3. The Equal Regulation Statute

[1]Section 69-3-807, MCA, was enacted in 1985 as part of House Bill 577.

RTC also contends that there is very little information before the Commission from which to apply the "equal regulation" statute, § 69-3-807(6), MCA, which provides:

> All providers of comparable regulated services within a market area must be subject to the same standards of regulation. For purposes of this section, regulated telecommunications services are comparable to the extent alternative providers can make functionally equivalent substitutes or substitute services readily available.

RTC stated in its application that it considers its Switched 56 Kb service to be competitive and based its pricing decision on PTI's "equivalent service" provided to the Salish-Kootenai College in RTC's traditional service territory. RTC further stated that it hoped to lure that customer into taking similar service from RTC. Clearly, RTC views PTI's Datapath service and its own Switched 56 Kb service as "comparable" as that term is used in § 69-3-807(6), MCA. It is also clear that the intended market area includes the area where PTI now provides service to the Salish-Kootenai College within RTC's exchange boundaries.

PTI's Datapath service is regulated by the Commission as a tariffed service. The Commission's initial decision in this proceeding cited this "equal regulation" statute as a further basis for requiring RTC's Switched 56 Kb service to be tariffed, in addition to the competitive analysis explained above. Clearly, the "equal regulation" statute requires that RTC's Switched 56 Kb service be fully tariffed.

Commission Decision and Order

In conclusion, the MTA supports approval of the service on fully-tariffed terms rather than an outright denial of the application. The MTA and Montana case law do not support the argument made by RTC that the Commission rules are beyond the authority of the Commission and that they would be found invalid by a court. Therefore, it was appropriate for the Commission to examine numerous factors, particularly competitive factors, in making a decision on RTC's Switched 56 Kb application. Although the essential conclusion here comes from considering RTC application under the detariffing rules for new services, not from the "equal regulation" statute, the "equal regulation" statute adds additional support to the conclusion that the service should not be detariffed.

The Commission reaffirms its decision to approve RTC's Switched 56 Kb service on a tariffed basis. In so doing, the Commission considered how detariffing the Switched 56 Kb service would affect competition and the public interest. There is a limited potential market for the service and competition in RTC's service area does not appear to necessitate the rapid price response ability that would be permitted with detariffing. Approval on a tariffed basis neither precludes the introduction of this new and beneficial service nor discourages competition, but may preserve other public interests. These public interests include mitigating cross-subsidy concerns and monopoly pricing abuses. The Commission concludes that the need to preserve other public interests outweighs RTC's need for the pricing flexibility that would be allowed with a detariffed classification for Switched 56 Kb service.

Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. RTC is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA.

2. Switched 56 Kb service is a "regulated telecommunications service" as defined by § 69-3-803(3), MCA. The Commission properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

3. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

4. The Commission may approve a service filed pursuant to § 69-3-810, MCA, the "new service" statute, on a tariffed or detariffed basis. ARM 38.5.2730 - 38.5.2750, the Commission's rules for detariffing new services pursuant to § 69-3-810, MCA, are valid and enforceable rules. Pursuant to these rules, the Commission properly examined numerous criteria, including competitive effect, in making a decision on RTC's Switched 56 Kb application. In so doing, the Commission considered how detariffing the Switched 56 Kb service would effect competition and the public interest.

5. Section 69-3-807(6), MCA, the "equal regulation" statute, mandates that providers of comparable services in the same market area must be subject to the same standards of regulation. PTI's service in the RTC traditional service area is tariffed. RTC's Switched 56 Kb service must be regulated in the same manner as PTI's Datapath Service.

Order

THEREFORE, based upon the foregoing, it is ORDERED as follows:

1. RTC's request to provide Switched 56 Kb service on a detariffed basis is denied. RTC's application is approved on a tariffed basis. The rate is $35.00 per month.

2. RTC is directed to file compliance tariffs with the Commission within 15 days from the service date of this Order, which incorporate all of the decisions herein.

DONE AND DATED at Helena, Montana, this 16th day of September, 1996, by a vote of 4-1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

_____
NANCY MCCAFFREE, Chair

_____
DAVE FISHER, Vice Chair
(Voting to Dissent)

_____
BOB ANDERSON, Commissioner

_____
DANNY OBERG, Commissioner
(Voting to Concur - Attached)

_____
BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

NOTE: You may be entitled to judicial review in this matter. Judicial review may be obtained by filing a petition for review within thirty (30) days of the service of this order. Section 2-4-702, MCA.

Concurring Opinion
Docket No. N95.8.119, Order No. 5941
Commissioner Danny Oberg

In my almost 15 years of regulatory experience I can recall no single tariff filing which has engendered so much debate and discussion at the Commission level. The length of the consideration indicates how complex and seriously the Commission and its staff considered its responsibilities to both the provider of the services and the consuming public. While Ronan Telephone may not agree with the decision, they should receive some satisfaction that the decision was subject to so much study and thought. The decision was not made arbitrarily or easily. Regulation has always been a balancing of conflicting financial interests. But the debate in this instance had broader implications as the Commission considered such factors as both the letter and spirit of Montana law, the intent of federal regulation and the effects on such public policy goals as enhancing competition in telecommunication services.

It is this balancing of interests that led me reluctantly to vote for this order. To not affirm the original decision would have run contrary to the public interest. As a matter of rule this Commissioner generally supports light regulation of new technologies to encourage deployment of such services and to enhance competitive forces. Further, I believe the passage of the small telecommunication company statutes indicates a legislative preference for less strenuous regulation for small companies.

However, it is my conclusion that the instant tariff filing does not meet the public policy goals as stated in the Montana Telecommunications Act nor statutory provisions which require equal regulation. To allow detarriffing would have required an interpretation of the equal regulation statute this Commissioner was not ready to accept.

Further, other than legal fees which could have been avoided, I believe the applicant has not suffered nor will it suffer financial harm because of the Commission's order. During the consideration process itself, the Commission took great care to insure service was being provided and that no other customer was being harmed. In addition, I believe if Ronan were to find itself in an uncompetitive situation, the Commission would expedite any consideration and processing of a rate change to meet the needs of the company.

Ronan is to be congratulated for its diligence in seeking to meet the needs of its customers. And while there was a competitive challenge for this one customer, the Commission must be aware that new customers in Ronan's service territory may not have another carrier's presence to restrain price increases. Until Switched 56 service is offered more ubiquitously and deployed in a larger geographical area, detariffing may be premature. Premature dispensing with the protection of published tariffs by approving the service as detariffed may have harmed future customers.

All other regulated Montana telephone companies are offering Switched 56 service on a tariffed basis so Ronan has no competitive disadvantage. If anything, Ronan has the advantage from knowing the tariffs that predate their application.

As a Commissioner I receive more calls and expressions of concerns about price and deployment of Switched 56 type services than I do inquiries over regulated basic services. Montanan's want and desire these type of services, but it is clear they expect oversight from their government. These are not just optional services for new technology developments in business, education and medicine; they are basic elements of a total communications package. Until competition is more robust the Commission is right to keep these services fully tariffed and subject them to price change reviews.

I have advocated to the Governor's Blue Ribbon Telecommunications Task Force that the Commission needs further guidance on which telephone services should be regulated and the level of appropriate regulation. Until the Task Force or Legislature speaks the Commission is correct to err on the side of caution.

For the above reasons, I concur with the Commission order. Tariffing, at the present time, is in the public interest.

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Danny Oberg
Commissioner